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Governing Law on Forum-Selection Agreements

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Governing Law on Forum-Selection Agreements

KEVIN M. CLERMONT*

The task of determining which law governs a contractual choice-of-forum clause is an enigma to courts. The key to its solution lies at the very heart of the subject, where one encounters its most celebrated riddle: Which law governs when the parties have also agreed to a choice-of-law clause—that is, does a court first test the forum-selection clause under the law of the seised forum, or does one first look at the parties' choice of law to apply the chosen law to the forum-selection clause?

This chicken-or-egg mystery throws courts into contortions. Prior commentators have opted for the chosen law. But differentiated cases, policy arguments, and doctrinal consistency all support applying lex fori to enforceability of the forum-selection agreement—while applying the chosen law as to the agreement's interpretation or, in the absence of a choice-of-law clause, the chosen court's law.

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INTRODUCTION

The key to solving the enigma of which law governs a contractual choice-of-forum clause lies at the very heart of the subject, where one encounters its most celebrated riddle:¹ Which law governs when the parties have also agreed to a choice-of-law clause—does a court first look under the law of the seised forum at the forum-selection clause, or does a court first look at the parties' choice of law to apply the chosen law to the forum-selection clause—which comes first? This mysterious “conundrum [of] the chicken or the egg”² throws courts and commentators into “conflict-of-laws contortions.”³

To illustrate the confusion generated when a choice-of-law clause appears together with a forum-selection clause, imagine the following hypothetical:

1. “I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma; but perhaps there is a key. That key is Russian national interest.” Winston Churchill, *We Will Deal in Performances, Not Promises*, BBC Radio Broadcast (Oct. 1, 1939), in *VITAL SPEECHES OF THE DAY*, Oct. 1939, at 12.

2. *Beilfuss v. Huffy Corp.*, 685 N.W.2d 373, 376 (Wis. Ct. App. 2004) (discussing interaction of choice-of-law and choice-of-forum clauses). Incidentally, assume that a chicken and a half lay an egg and a half in a day and a half. How many eggs does one chicken lay in one day? See Erryn Bard, Comment to *One Chicken, One Day*, MATH FORUM @ DREXEL (Apr. 19, 2002, 10:20 AM), <http://mathforum.org/library/drmath/view/60419.html>.

3. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 347 (1988) (discussing judicial reaction to interaction of choice-of-law and choice-of-forum clauses).

A consumer contract, between a foreign corporation and a local person, contains a predispute forum-selection clause making the corporation's home court the sole proper forum. Because the corporation knew that U.S. law would hold the forum-selection clause unenforceable on public policy grounds, the corporation induced the consumer to agree to a choice of its home country's law, which favors forum-selection clauses. The consumer brings a tort claim arising from the contract in her home court in the United States. The corporate defendant moves to dismiss, invoking the forum-selection clause against the plaintiff. Which law governs the enforceability and interpretation of the forum-selection clause, the law of the U.S. court or the foreign law?

Nonetheless, I shall try to show that there is little reason for the confusion. Part I will set the context for contemplating the enigma. Part II will show that the cases, but not the commentators, give a solid solution in their holdings and rationales: apply *lex fori* for enforceability of the forum-selection agreement while applying the chosen law for its interpretation. Part III will demonstrate that this solution conforms nicely to the rest of the neighboring legal terrain, and in particular to the intermingled *Erie* question on forum-selection agreements.

I. GENERAL CONTEXT

Today, parties have significant powers to select a forum, even in advance of dispute.⁴ They can do so in a so-called forum-selection clause or agreement, which is a contractual provision establishing a place for specified litigation between them. The agreement overcomes territorial jurisdiction, venue, and related defenses, with valid consent able to override even the constitutionally based aspects of those defenses. Under modern law, courts will usually give effect to "prorogation" or permissive agreements, which, on a nonexclusive basis, authorize suit at a place despite otherwise applicable law. Additionally, the parties generally may, by a "derogation" or mandatory agreement, restrict on an exclusive basis any potential litigation to one or more courts.

Parties come to such agreements, and they do so frequently, for a variety of reasons. One side might be imposing a preferred forum on the other, or both parties might be seeking a neutral, convenient, efficient, or expert forum. In any event, the parties will consequently be able to plan their affairs with greater certainty, and they will be able to reduce eventual litigation over forum selection and reduce the risk of parallel litigation in multiple forums. Accordingly, forum-selection clauses are becoming more and more important in practice. Good lawyers increasingly

4. See generally GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS ch. 5 (5th ed. 2011) (providing sources for Part I's overview). The agreement can be asymmetrical, applying differently to the two parties. See *id.* at 509.

try to contract their clients' way around the morass of the law on authority to adjudicate, and to do so in a way that advantages their clients.

A. DISTINCTION BETWEEN ENFORCEABILITY AND INTERPRETATION

With certainty being a major incentive, it becomes imperative for the parties to foresee what law will apply to the forum-selection clause. Its legal effect could come up in various settings. The most important is when a lawsuit is brought in some court, a challenge is then made to jurisdiction or venue, and a party invokes the clause to support or to refute the challenge.⁵ Will the seised court enforce and interpret the clause so as to uphold the parties' chosen place for suit?

Obviously, not all forum-selections clauses get enforced, even in a jurisdiction that has embraced enforceability in principle. At the least, the usual requirements of and defenses to contractual validity still apply, although in applying them the court will treat the clause as a separable contract. Thus, the resistor might show fraud, duress, undue influence, lack of assent, overweening bargaining power, overreaching, impossibility, or unconscionability as to the clause. Also, the court might invoke a concept of public policy, typically narrow, to strike down the clause.

Many more of the litigated cases, however, turn on how to interpret these clauses, most often as a result of the drafting lawyers' failings. Office lawyers need to know a lot of law, including choice of law, to negotiate and write a forum-selection clause effectively and clearly.

5. A different setting where a contractual choice of forum could come up would be where one party seeks to enjoin litigation that is proceeding elsewhere in possible violation of a forum-selection agreement. See *Szymczyk v. Signs Now Corp.*, 606 S.E.2d 728, 733 (N.C. Ct. App. 2005) (applying the law of Florida on enforceability, where the parties executed the contract choosing Florida law and a Florida forum).

Another setting would be in the course of recognition of a judgment rendered in possible violation of the forum-selection clause. The fact is that the doctrines of full faith and credit and of jurisdiction to determine jurisdiction would moot most such questions through the operation of preclusion, except in two situations. First, an American default judgment could violate the forum-selection clause. The primary question would be whether the judgment was validly rendered. The recognition court should apply the rendering court's jurisdictional law. The consequent question is whether the rendering court, under its own law, would view violation of the forum-selection clause as undoing validity—which is highly unlikely. Of course, courts sometimes go astray in formulating the question. See, e.g., *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1013–14 (S.D. W. Va. 1976) (allowing a federal collateral attack on a New York state default judgment for lack of jurisdiction because the forum-selection clause designating a New York forum was unenforceable under West Virginia law, even though the contract chose New York law). But most courts will respect the rendering court's law. See *Hoffman v. Nat'l Equip. Rental, Ltd.*, 643 F.2d 987, 989 (4th Cir. 1981) (disallowing a West Virginia federal collateral attack on a New York state default judgment and saying, “[w]e disapprove of *Leasewell* to the extent that it holds otherwise”). Second, in the situation of a foreign-country default judgment, under the looser restrictions of comity, a court in the United States may decline recognition based on violation of a forum-selection clause that is enforceable under the U.S. court's law. See *Diamond Offshore (Berm.), Ltd. v. Haaksman*, 355 S.W.3d 842, 846 (Tex. App. 2011); BORN & RUTLEDGE, *supra* note 4, at 1130–31; Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 522 (2013).

Therefore, in addition to the issue of enforceability (including validity concerns),⁶ serious problems of interpretation (including construction rules)⁷ plague the judicial treatment of forum-selection clauses.

B. EVOLUTION OF LAW ON FORUM-SELECTION CLAUSES

Such party autonomy did not reign in the old days, although it was not completely unknown. Party choice had influence in the outpost of admiralty law, where the law first felt the “practical problems created by the intersection of an expansive jurisdictional grant in admiralty with a highly mobile litigant pool.”⁸ Since the eighteenth century, admiralty courts have been enforcing some forum-selection agreements, eventually doing so within the context of forum non conveniens.⁹ For an additional inroad made by party choice, one could point to the long-established role of post-dispute consent in bestowing territorial authority to adjudicate.¹⁰

Starting in middle of the twentieth century, however, there was a decided shift from mainly treating forum-selection clauses as per se unenforceable for infringement of sovereignty (no bestowal or ouster of jurisdiction being the old slogan) to mainly letting parties select their forum in growing recognition of party autonomy (freedom of contract being the new slogan).¹¹ American courts shifted from a view that authority to

6. Cf. William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 16–21 (2006) (distinguishing the concepts of enforceability and validity); Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT’L L. & FOREIGN AFF. 43, 47–62 (2004); Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521, 2546 n.227 (2014).

7. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 cmt. a (1988) (distinguishing the concepts of interpretation and construction).

8. David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 978 (2008).

9. See *id.* at 993–1015.

10. See *Clark v. Lowden*, 48 F. Supp. 261, 264 (D. Minn. 1942); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 32 (1988).

11. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–97 (1991) (even more expansively enforcing a forum-selection agreement, while seemingly recognizing as exceptions only fraud in inclusion of the clause or an unreasonably chosen forum); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–15 (1972) (generally approving forum-selection clauses); *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (approving the defendant’s predispute waiver of objections to territorial jurisdiction); *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (Posner, J.) (“We are persuaded that the only good reason for treating a forum selection clause differently from any other contract (specifically, from the contract in which the clause appears) is the possibility of adverse effects on third parties. Where that possibility is slight, the clause should be treated like any other contract. What is more, if any inconvenience to third parties can be cured by a change of venue under section 1404(a), that is the route to follow, rather than striking down the clause.”); cf. PETER HAY ET AL., CONFLICT OF LAWS 544–45 (5th ed. 2010) (discussing comparable state developments). See generally Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. U. L. REV. 265 (2009). The courts were not alone in making the shift. See MODEL CHOICE OF FORUM ACT, reprinted in Willis L.M. Reese, Document, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969) (treating the uniform act approved by the National Conference of Commissioners

adjudicate is largely a matter for the sovereign and not the parties to decide, through a grudging acceptance of party agreements, toward a perhaps overly enthusiastic embrace of freedom of contract even in the face of uneven bargaining capabilities and powers. Where the optimum lies and where American law will end up are still matters of debate and evolution.

To understand the current law, one should remember to frame the modern elevation of party autonomy as shifting the preexisting law on forum-selection agreements rather than creating a completely new approach.¹² The image of a shift conveys the idea of changed emphases among the component factors.

As suggested, the old view emphasized the idea that it was for the sovereign to decide what the sovereign's courts could or could not do; it was not for the parties to make private agreements as to the availability of public remedies. Forum shopping, all by itself, appeared unseemly. In particular, it seemed better to head off any abuse by one side in contracting for an overly favorable court, especially when the other side included local litigants or individuals with weak bargaining power.

The new view drew vigor from the modern value placed on freedom of contract. Modern legal systems have come to see territorial jurisdiction and venue as largely protections for the parties, and thus waivable, rather than as pure expressions of sovereign interest. At the same time, parties increasingly need to protect themselves by contract from unexpected or undesirable forums, especially in international commerce.

The persisting tensions between these policy arguments mean that even today party autonomy does not prevail everywhere. Some U.S. states still consider forum-selection clauses to be per se unenforceable (Idaho, Iowa, and Montana),¹³ while other states sometimes ignore them by giving them less weight than other contracts (as by treating them as a factor in a discretionary forum non conveniens analysis) or subject them to more defenses (such as imposing a vaguely defined but expansive test for the reasonableness of the chosen forum). Foreign-country law might go its own way, by which the country might refuse to enforce clauses against consumers or might construe an ambiguous clause as being presumptively

on Uniform State Laws in 1968 but withdrawn in 1975); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1988). The shift continues, as shown by the new Hague Convention, signed by the United States but not yet in force, that would extend the effectiveness of forum-selection clauses. *See* Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (2005) [hereinafter *Hague Convention*], discussed in RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2008). Finally, the shift was not limited to forum-selection clauses, as shown, inter alia, by the earlier similar developments regarding arbitration clauses. *See* BORN & RUTLEDGE, *supra* note 4, at 484–85, 1157–70.

12. *See* Marcus, *supra* note 8, at 1048.

13. *See* BORN & RUTLEDGE, *supra* note 4, at 469.

exclusive.¹⁴ In sum, the question of which law will govern the forum-selection clause remains one of great importance.

C. JUDICIAL CHOICE OF LAW TO GOVERN FORUM-SELECTION CLAUSES

Assuming for the moment an absence of a choice-of-law clause, the court where the case gets filed would have to choose among (1) its own law on forum-selection clauses, (2) the law of the chosen court, and (3) the law that will cover the underlying contract.¹⁵ Virtually no one pushes for the third solution of looking to the place whose law will cover the contract, perhaps because of the common distaste for the conflicts process's difficulty and uncertainty.¹⁶ A few authorities do urge application of the chosen court's law, on the view that the forum-selection agreement is an implicit choice that the selected forum's law should govern the forum-selection agreement.¹⁷ Almost all American courts apply their own law, the *lex fori*.¹⁸ Most do so with little or no thinking.¹⁹ There has been an occasional suggestion of leavening the usual *lex fori* by looking to other law for interpretation, as opposed to enforceability, of the clause.²⁰

Those courts embracing *lex fori* have a powerful role model. In *The Bremen v. Zapata Off-Shore Co.*,²¹ the Supreme Court momentarily upheld a forum-selection clause. A Texan corporate plaintiff sued a German corporate defendant in a Florida federal court, in admiralty, for damage inflicted while the defendant was towing the plaintiff's drilling rig in the

14. See Yackee, *supra* note 6, at 49, 52–62 (treating enforceability and interpretation in European law).

15. See GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 138–39 (4th ed. 2013) (laying out the problem).

16. See, e.g., *Eisaman v. Cinema Grill Sys., Inc.*, 87 F. Supp. 2d 446, 448 n.3 (D. Md. 1999) (dictum favoring such an approach); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. g (Tentative Draft No. 1, 2014) (citing only *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007), in which there was actually a choice-of-law clause).

17. See, e.g., *My Café-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 864–65 (Tex. App. 2003); Yackee, *supra* note 6, at 90–94 (advocating such an approach).

18. See, e.g., *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127–28 (5th Cir. 1994) (applying federal law to interpretation of the forum-selection clause); *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 867 (9th Cir. 1991) (“Federal law governs the validity of the forum selection clause.”); *Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990) (applying federal law to enforceability of forum-selection clause); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513–14 (9th Cir. 1988) (applying federal law to enforceability and scope of the forum-selection clause); Yackee, *supra* note 6, at 67–72 (describing this approach).

19. See Yackee, *supra* note 6, at 67 (“In practice, and with rare exceptions, United States courts tend not to engage in explicit choice of law analysis when determining the validity and enforceability of a given international [forum-selection agreement].”); *id.* at 69 (“This bias towards *lex fori* to supply rules of enforceability . . . also extends to the enforcement of *domestic* [foreign-selection agreements].”); *id.* at 89–90 (noting there are few reported decisions).

20. See, e.g., *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (dictum) (Posner, J.) (“Validity and interpretation are separate issues, and it can be argued that as the rest of the contract in which a forum selection clause is found will be interpreted under the principles of interpretation followed by the state whose law governs the contract, so should that clause be.”).

21. 407 U.S. 1, 4 n.4, 14 n.15 (1972).

Gulf of Mexico. In their towage contract, the parties had chosen a London forum. Then in the federal court, the defendant invoked the forum-selection clause, but the plaintiff claimed it to be unenforceable under the traditional American disfavor. Applying (while overhauling) federal law, or here *lex fori*, the Supreme Court enforced the clause, with hardly a preliminary thought on conflicts and with barely a mention of English law.

In *Carnival Cruise Lines, Inc. v. Shute*,²² the Supreme Court upheld another forum-selection clause. A Washington state couple sued the Florida corporate defendant in a Washington federal court, in admiralty, for injury to the wife while cruising on the defendant's ship off the coast of Mexico, in the Pacific Ocean. In small print on the back pages of their passenger ticket, there was a clause designating a Florida forum. Then in the federal court, the defendant invoked the forum-selection clause but the plaintiffs claimed it to be unenforceable. Applying (while extending) federal law, or *lex fori*, the Supreme Court enforced the clause, with scant consideration of choice of law.

More recently, the Supreme Court has indicated that the federal statutes on transfer of venue or the federal doctrine of forum non conveniens can override the forum-selection clause. According to *Stewart Organization v. Ricoh Corp.*²³ and *Atlantic Marine Construction Co. v. U.S. District Court*,²⁴ 28 U.S.C. § 1404(a) can override any forum-selection clause in federal court, allowing the chosen court to transfer to a federal court where the case might have been brought absent the clause. In cases where the preferable court is a foreign or state court, the federal court may entertain the possibility that forum non conveniens will trump a forum-selection clause agreeing on suit in that federal court.²⁵ Still, "forum-selection clauses should control" in "all but the most unusual cases."²⁶

Thus, the Supreme Court seems to have resolved the conflicts question in favor of *lex fori*. In federal court, the *lex fori*, or federal law, favors forum-selection clauses. The federal court will usually enforce any valid clause. But the flexibility in determining the clause's validity and in the public policy safety valve render the decision, in the end, a discretionary one, somewhat like a transfer or forum non conveniens decision heavily weighted in favor of the chosen forum.²⁷

22. 499 U.S. 585, 590 (1991) ("[F]ederal law governs the enforceability of the forum-selection clause we scrutinize.").

23. 487 U.S. 22, 28–30 (1988).

24. 134 S. Ct. 568, 577–79 (2013).

25. See *id.* at 580, 583 n.8. In this context, forum non conveniens works similarly, but maybe not identically, to transfer of venue. See Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 711–16 (2015).

26. *Atl. Marine*, 134 S. Ct. at 582–83; cf. *id.* at 575, 581 (requiring "extraordinary circumstances").

27. See Marcus, *supra* note 8, at 1015 ("Discretion meant that courts . . . had the ultimate power to determine when court access doctrine should defer to the parties' agreement."); *id.* at 1013 ("The

II. EFFECT OF CHOICE-OF-LAW CLAUSES

The parties also have significant powers to select the governing law for their contract. As a result, a choice-of-law clause frequently appears together with a forum-selection clause.²⁸ Even in a court that would enthusiastically enforce the choice-of-law clause on the underlying contract, perhaps on the ground of economic efficiency,²⁹ it does not follow that the parties' choice of law should govern the separable forum-selection clause. Even if the parties specifically intended their choice of law to govern their forum selection too, it still does not follow that their chosen law should govern the forum-selection clause. It could instead be that the court would choose to control its own jurisdiction and venue, doing so by considering the forum-selection clause before the choice-of-law clause. When these two clauses collide in such a manner, the chicken-

term *unreasonable* described clauses that would not be enforced under the [discretionary] approach.”). In the view of many, *Stewart* and *Atlantic Marine* do not mesh well with *Bremen* and *Carnival Cruise*. See *id.* at 1021–26, 1041 (reconciling *Stewart* by taking a historical view of forum-selection clauses); cf. Andrew D. Bradt, *Atlantic Marine and Choice-of-Law Federalism*, 66 HASTINGS L.J. 617, 629–31 (2015) (stressing the difference between *Stewart* and *Atlantic Marine*). The way to make sense of *Stewart* and *Atlantic Marine* is to recognize that the federal law on enforceability of forum-selection clauses is ultimately a discretionary standard. If the court in its discretion finds the clause to be enforceable, and if the competing court is federal, then the federal court makes a separate discretionary decision based on § 1404(a) public-interest factors whether to override the choice of forum. Because an enforceable forum-selection clause is just a factor, albeit now a huge one, in that second decision on the appropriate federal court, transfer or retention or dismissal can very occasionally follow despite the clause. This result is not jarring, however, because enforceability of the clause was discretionary in the first place.

Atlantic Marine also ruled that a necessary condition for the venue in the transferor court being “wrong” and so triggering 28 U.S.C. § 1406(a) is that the venue violates the requirements of the federal venue laws, even if it violates a forum-selection clause. See *Atl. Marine*, 134 S. Ct. at 577–79. The discretionary standard makes *some* sense of this holding too. On the one hand, the parties’ clause does not by itself make a venue right or wrong. A wrong venue under the transfer statute arguably refers to places not designated by the federal venue laws, without regard to the eventual place of suit pursuant to transfer, forum non conveniens, or party agreement. Cf. Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675, 677 (2015) (noting “party preferences are subordinate to legal directives”). On the other hand, use of § 1404(a) required the Court to create an exception to the rule that transferor law applies to the transferred case. To avoid an inequitable advantage to the agreement-breaching plaintiff, the chosen transferee court will apply its own law just as it would have under § 1406(a). See 134 S. Ct. at 582–83. It thus would seem a smoother course for the Court to have held a federal forum that is going to enforce a forum-selection clause by transfer is a “wrong” venue under § 1406(a).

As an additional argument against the Court’s approach, the Court might not have managed to cram all federal-to-federal forum-selection clause battles into § 1404(a) after all. Sometimes § 1406(a) would seem to be the correct route. If the plaintiff sues in the chosen federal forum, but that forum is otherwise wrong under the venue laws, then the motion to transfer would seem to lie under § 1406(a) rather than § 1404(a), at least if the court finds the forum-selection clause unenforceable. See *id.* at 577 (“If [the case falls within the venue statute], venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a).”); Bradley Scott Shannon, *Enforcing Forum-Selection Clauses*, 66 HASTINGS L.J. 777, 780–81 (2015).

28. See BORN, *supra* note 15, at 33.

29. See ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 56–60 (2009).

or-egg problem becomes more obvious, and confusion on the conflicts issue suddenly explodes into open debate.

Because the parties choose a forum in large part to augment certainty, the legal system should try to be clear on the extent of the parties' powers to select the governing law on forum choice. Thus far, the system has failed miserably in clarifying whether the parties can choose the law to govern forum-selection agreements.

A. CASES AND COMMENTARIES

If the parties have included a valid choice-of-law clause that encompasses within its scope the forum-selection clause, then (1) the usual reference to *lex fori* on the enforceability and interpretation of the forum-selection clause must compete with (2) a conflicts rule that would look to the chosen law. Other competing alternatives would include *dépeçage* approaches that would apply *lex fori* to some issues concerning the forum-selection clause and apply the chosen law to other such issues,³⁰ or even approaches that would require some aspects of the forum-selection clause to pass muster under both laws.³¹

The typical treatise approach is to describe the American cases as split between *lex fori* and the chosen law.³² That description suffers from a serious selection effect: looking only at cases that decide the point is inapt because they are a biased subset of the run of all cases (or all disputes). The great mass of cases presenting the problem do not expressly allude to it at all, be that the fault of the judges or the lawyers.³³ The few cases that discuss the problem tend to split; they draw all the attention of treatise writers; the result is to make this puzzle look a good deal more puzzling than it is.

30. See *Smith, Valentino & Smith, Inc. v. Superior Court of L.A.*, 551 P.2d 1206, 1208-10 (Cal. 1976) (applying the chosen law as to enforceability, but *lex fori* as to public policy and as to interpretation); cf. Hague Convention, *supra* note 11, art. 6(a)-(c) (proposing treaty that would apply *lex fori* for parties' capacity and for public policy, but the chosen law to see if the clause is "null and void").

31. See *Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft mbH*, 618 F. Supp. 344, 347 (N.D. Ill. 1985) (applying both German and federal law to enforceability); BORN & RUTLEDGE, *supra* note 4, at 532 & n.180, 544. The most likely candidate for redundant application of law is public policy restrictions. See *Deere Credit, Inc. v. Grupo Granjas Marinas, S.A. de C.V.*, No. 4:03-CV-10381, 2004 WL 729123, at *2-4 (S.D. Iowa Mar. 3, 2004) (applying both *lex fori* and chosen law as to public policy); *Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719, 723-26 (Utah 2005) (same); BORN & RUTLEDGE, *supra* note 4, at 532 & n.179. But see *infra* note 54 (arguing against redundant treatment of public policy).

32. E.g., HAY ET AL., *supra* note 11, at 1148 ("American courts are split between applying the law of the forum *qua* forum and applying the chosen law if the choice-of-law clause is otherwise valid.").

33. See BORN & RUTLEDGE, *supra* note 4, at 532; Mullenix, *supra* note 3, at 346 & n.292, 350 (citing cases); *id.* at 348 ("In large measure, the scope of choice-of-law clauses combined with forum-selection clauses has not been examined in any meaningful fashion."); Yackee, *supra* note 6, at 77-79 (discussing fault of judges and lawyers); *id.* at 63 ("Despite the multi-layered complexity of this choice of law problem, United States courts rarely engage in explicit conflict of laws analysis when determining whether an international [forum-selection agreement] is valid and enforceable.").

What are the cases that ignore the problem doing? They, of course, are applying *lex fori*. So, if we were to consider all American cases, we would say that the vast majority apply *lex fori*. Indeed, it appears that the courts “reflexively apply *lex fori*” even in the face of a choice-of-law clause.³⁴ We could almost say the question is settled.

Nevertheless, on the basis of policy, the few scholars who have ventured into the thicket align in favor of applying the parties’ chosen law, all the while acknowledging that the cases are against them.³⁵ Therefore, one cannot rely on a headcount of cases. One must decide, as between the case law and the scholarship, which has the better argument.

One needs to look more closely at the split in cases that actually discuss the problem to see why the courts are doing what they are doing. This closer look, surprisingly, reveals that the split is more superficial than real. Yes, some cases apply *lex fori* despite the choice-of-law clause and some cases apply the chosen law, but the two camps are often addressing different subproblems. On the one hand, most cases apply *lex fori* to questions of enforceability of a forum-selection clause,³⁶ while a few others apply the chosen law, usually after a bare reference to the existence of a choice-of-law clause.³⁷ On the other hand, many cases apply the *chosen*

34. Yackee, *supra* note 6, at 67; see J. Zachary Courson, Survey, *Yavuz v. 61 MM, Ltd.: A New Federal Standard—Applying Contracting Parties’ Choice of Law to the Analysis of Forum Selection Agreements*, 85 DENV. U. L. REV. 597, 601 (2008) (“Overwhelmingly, courts have used *lex fori* in interpreting and enforcing [forum-selection agreements] in international agreements, notwithstanding the inclusion of [choice-of-law clauses].”).

35. BORN & RUTLEDGE, *supra* note 4, at 498, 532 (emphasizing freedom of contract as overriding factor); Yackee, *supra* note 6, at 46, 84–88 (emphasizing parties’ need for certainty as overriding factor in conflicts analysis); Courson, *supra* note 34, at 597 (stressing party autonomy, but focusing on a case involving interpretation of a forum-selection clause).

36. See, e.g., *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) (“Despite the presumptive validity of choice-of-law clauses, our precedent indicates that federal law should be used to determine whether an otherwise mandatory and applicable forum clause is enforceable . . .”); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 388–89 (1st Cir. 2001) (applying federal law when the parties had selected Illinois courts and Illinois state law); *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 509–10 (2d Cir. 1998) (applying federal law to choice of Dutch forum rather than chosen Dutch law); *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301–05 (5th Cir. 1998) (applying federal law to dismiss in favor of chosen Peruvian forum rather than using chosen Peruvian law); *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 159–62 (7th Cir. 1993) (applying federal law to choice of English forum rather than chosen English law); *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151, 155 (E.D.N.Y. 2013) (“A choice-of-law clause governs only substantive law, not procedural law. Questions of venue and forum are procedural, so the enforceability of the forum-selection clause is governed by federal law.” (citations omitted)); *BNY AIS Nominees Ltd. v. Quan*, 609 F. Supp. 2d 269, 273–74 (D. Conn. 2009) (upholding choice of Bermudan forum under federal law rather than under chosen Bermudan law); *HAY ET AL.*, *supra* note 11, at 1148 n.7 (citing state cases).

37. See, e.g., *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1147 (Idaho 1989) (applying the chosen Florida law, but construing it to mean that Florida would not uphold clause if it violated the public policy of Idaho, which it did); *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 744 (Mass. 1995) (upholding clause after saying, “[t]herefore, in the absence of any substantial Massachusetts public policy reason to the contrary, Massachusetts’s attitude toward the forum selection clause is unimportant, and we should turn to the law of California to determine the effect of that clause”),

law to legal questions of interpretation,³⁸ while more than a few cases apply *lex fori* to interpretation of a forum-selection clause.³⁹ Dissecting the split, however, is but the first step in the analysis.

B. POLICY ARGUMENTS

As the second step in the analysis, one needs to distill the arguments for *lex fori* and for the chosen law. A residue of disagreement does remain in the case law, and the disagreement exposes the relevant arguments. Consider, initially, which law should govern enforceability of a forum-selection clause when there is a choice-of-law clause.

Applying *lex fori* would further the following ends:

- Applying *lex fori* to the forum-selection clause allows the court to control its own jurisdiction and venue, and to do so by uniform rules.

followed, *Melia v. Zenhire, Inc.*, 967 N.E.2d 580, 586 (Mass. 2012) (“Because the contract states that it is to be governed and construed according to the laws of New York, we determine the validity of the forum selection clause according to the law of our sister State.”).

38. See, e.g., *Martinez v. Bloomberg LP*, 740 F.3d 211, 214 (2d Cir. 2014) (holding that “where a contract contains both a valid choice-of-law clause and a forum selection clause, the substantive law identified in the choice-of-law clause governs the interpretation of the forum selection clause, while federal law governs the enforceability of the forum selection clause”); *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 648–51 (4th Cir. 2010) (applying chosen English law to interpret mandatoriness of clause, but federal law to its enforceability); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 431 (10th Cir. 2006) (applying chosen Swiss law to interpret mandatoriness and scope of clause), noted in Courson, *supra* note 34, at 621–22; *AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148, 155–56 (2d Cir. 1984) (applying chosen Dutch law to interpreting mandatoriness of clause, but federal law to its enforceability); *Rudgayzer*, 986 F. Supp. 2d at 156–57 (applying chosen California law to interpreting mandatoriness and scope of clause); *Global Link, LLC v. Karamtech Co.*, No. 06-CV-14938, 2007 WL 1343684, at *2–3 (E.D. Mich. May 8, 2007) (applying chosen Korean law to interpreting mandatoriness of clause).

39. See *K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 499–501 (10th Cir. 2002) (applying federal law to interpreting mandatoriness of clause despite chosen German law and forum, a view apparently rejected by *Yavuz*, 465 F.3d at 431); *Androutsakos v. M/V PSARA*, No. 02-1173-KI, 2004 WL 1305802, at *6–7 (D. Or. Jan. 22, 2004) (applying federal law to interpretation despite chosen Greek law and forum). But some cases applying federal law to interpretation involved lawyers who failed to argue the chosen law. See, e.g., *Phillips*, 494 F.3d at 386 (“However, the parties neither objected to the district court’s citation to federal precedent in its interpretation of the clause before us, nor construed the clause under English law in their briefs.”). More often, the cases applying federal law to interpretation turn only on uncovering intent, diving into which the courts feel comfortable without attention to the choice-of-law clause. See, e.g., *Gen. Elec. Co. v. G. Siempelkamp GmbH*, 29 F.3d 1095, 1099 (6th Cir. 1994) (“Because the clause states that ‘all’ disputes ‘shall’ be at Siempelkamp’s principal place of business, it selects German court jurisdiction exclusively and is mandatory.”); *Dearborn Indus. Mfg. Co. v. Soudronic Finanz AG*, No. 95 C 4414, 1997 WL 156589, at *3–6 (N.D. Ill. Apr. 1, 1997) (determining mandatoriness and scope from language), modifying 1996 WL 467245, at *4–5 (N.D. Ill. Aug. 13, 1996); cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204(a) (1988) (applying for contracts the chosen law to the rules of construction but not to the task of interpretation, although seemingly for the reason that interpretation turns on intent and so does not typically raise issues of law). It is conceivable that a court could apply one law to construction and another law to interpretation, but the sounder approach would be to recognize that the legal and factual tasks of construction and interpretation are so intermingled as to call for the same governing law.

- o *Lex fori* would avoid the discomfort of sometimes allowing foreign law to determine whether jurisdiction or venue exists in the seised court.

- o In some thin sense, jurisdiction and venue come first, and so the court should decide those questions before performing a choice-of-law analysis.

- o *Lex fori* would avoid the slight, and not insuperable, illogic of assuming an enforceable forum-selection or choice-of-law clause in order to choose the law to determine enforceability.

- o For good reasons, courts do not normally interpret choice-of-law clauses to cover procedural matters;⁴⁰ the enforceability of the separable forum-selection clause, sensibly and practically considered, appears procedural for this purpose.⁴¹

- Applying *lex fori*, rather than the chosen law, to the forum-selection clause closes the door to abusive clauses: the parties could be bootstrapping the forum-selection clause into enforceability by choosing a very permissive law, and the stronger party could be forcing the weaker party into an unfair forum applying unfair law.

- o The risk of abuse would be especially great in consumer contracts.

- Applying *lex fori* avoids all the usual difficulties of applying foreign law, and also results in applying what the forum will most often consider the forum-selection law that is better in light of a variety of considerations, including economic efficiency.⁴²

- Applying *lex fori* is consistent with analogous conflicts practices.

- o In the absence of a choice-of-law clause, almost all courts conclude easily in favor of *lex fori*, while virtually no court selects the law governing the contract under choice-of-law principles;⁴³ it would appear inconsistent to embrace the law governing the contract simply because the parties selected the law.

- o Forum-selection clauses and arbitration clauses are very similar in effect; *lex fori* governs the enforceability of the separable arbitration clause, just as the Federal Arbitration Act⁴⁴ and the New

40. See BORN, *supra* note 15, at 161; BORN & RUTLEDGE, *supra* note 4, at 763, 774–75; HAY ET AL., *supra* note 11, at 1137–41.

41. But see RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 104–10 (2012) (arguing that the clause's status as a contract makes it a substantive matter). Of course, the answer does not lie in a substance/procedure dichotomy, but in a sensitive consideration of conflicts policies. See *id.* at 43.

42. See Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245 (2014); Joseph William Singer, Commentary, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659 (2000); Verity Winship, *Aligning Law and Forum: The Home Court Advantage*, 81 TENN. L. REV. 1 (2013).

43. See *supra* Part I.C.

44. 9 U.S.C. §§ 1–16 (2015).

York Convention⁴⁵ govern in federal court and, by preemption, in state court.⁴⁶

- o Forum-selection clauses and choice-of-law clauses are somewhat similar in theory; *lex fori* governs at least the key issues of enforceability of the choice-of-law clause, which also means that there is no way to escape altogether applying *lex fori*.⁴⁷

- o Other countries seem generally to apply *lex fori* to forum-selection clauses.⁴⁸

Contrariwise, applying the parties' chosen law would serve these ends:

- Applying the chosen law to the forum-selection clause fits the modern indulgence of party autonomy, and so efficiently facilitates private ordering, conforms to expectations, and increases certainty.

- o Otherwise, the law will vary with the court selected by the plaintiff, and so the parties will not be sure what law will apply on the forum-selection clause and, hence, what law will apply to the rest of the lawsuit.

- o The lack of predictability would be especially detrimental in international commercial contracts.

- Applying the chosen law, rather than *lex fori*, to the forum-selection clause closes the door to abusive forum shopping: the plaintiff could be undermining the agreement by choosing a court that will treat the clauses in a way that favors the plaintiff.⁴⁹

At a glance, it appears that the policies in favor of *lex fori* are more numerous, if not stronger, than those against. Yet the most thorough article on the subject, written by Professor Jason Yackee while he was a student, came out solidly in favor of applying the chosen law.⁵⁰ In his view, the need for certainty carried the day.

45. 9 U.S.C. §§ 201–210.

46. See BORN & RUTLEDGE, *supra* note 4, at 1168–70, 1178, 1193; HAY ET AL., *supra* note 11, at 1149–52; cf. Yackee, *supra* note 6, at 87–88 (treating governing law on other issues concerning arbitration clauses); *infra* text accompanying note 75 (treating impact of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). On how to handle a forum-selection clause and an arbitration clause in the same contract, see Richard Garnett, *Co-Existing and Conflicting Jurisdiction and Arbitration Clauses*, 9 J. PRIVATE INT'L L. 361 (2013).

47. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1988) (subjecting contractual consent to *lex fori*); BORN & RUTLEDGE, *supra* note 4, at 758–63, 770–73 (looking more generally to *lex fori*); HAY ET AL., *supra* note 11, at 1129–30; Woodward, *supra* note 6, at 18–21; cf. *infra* text accompanying note 76 (treating impact of *Erie*, 304 U.S. 64). But see Yackee, *supra* note 6, at 87 (subjecting formal validity to the apparently chosen law).

48. See Yackee, *supra* note 6, at 72–74.

49. Other arguments have appeared on both sides, but I have omitted those that make little sense. For example, a popular argument for applying the chosen law is that we should resort to “normal conflicts reasoning.” See, e.g., *id.* at 84. When confronting a conflicts problem, advice to apply normal conflicts reasoning does not advance the ball. What does it even mean here? I think it is an argument against creating an exception to the chosen law's governance of the contract. But *lex fori* applies to many procedural matters in a suit on a contract. So, one just as easily could argue against creating an exception to *lex fori*'s governance.

50. *Id.* at 46, 84–88. However, he would allow the seised court to apply, in addition, its own public policy exception. See *id.* at 95–96.

In my view, however, his argument can be turned around by supplementing it. The seised court may very well share strong interests with other governments in fostering certainty through the parties' exercise of freedom of contract. But those interests have bounds. A sovereign will not favor party autonomy over matters it wants to control itself. There is nothing unusual, then, about imposing a limit on freedom of contract. The seised court might want to specify its own jurisdiction and venue. It would then decide that the parties cannot touch jurisdiction and venue in certain ways.⁵¹

All that sounds like the long-acknowledged tension between sovereign interest and party autonomy in the operation of forum selection. When confronted with that tension, the modern mind reacts skeptically. We do not swallow arguments about dreaded "bestowal" or "ouster" of territorial authority to adjudicate, viewing the dread as nothing but "old-think." "The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction."⁵²

We tend to bring that skepticism over from enforceability to the different problem of governing law. But right there comes the logical misstep. The problem is not whether to react to the old tension by drawing the line more toward approval of forum-selection agreements. Rather, the problem is to determine which sovereign has the predominant interest in making the decision of where to draw the line between sovereign interest and party autonomy. Not where to draw the line, but who gets to draw the line?

Another way to make the point is to hypothesize policymakers who feel the need to heighten certainty in private ordering. They would address the local law on forum-selection clauses, not the local conflicts law. The policy in play is freedom of contract, not whether the sovereign should continue to limit freedom of contract in order to control its own territorial authority extraterritorially. Indeed, if the policymakers were to order abandonment of *lex fori*, they would be ceding control of judicial authority, as well as of private ordering, to some foreign policymaker.

In brief, the issue here is not whether to approve forum-selection agreements, but which sovereign gets to decide whether to approve such agreements. Once framed as a typical conflicts problem, the answer appears clearly. The seised court may feel interests in optimally liberalizing party autonomy that compete with other sovereigns' interests, and the forum

51. For comparison, this kind of public policy defense to a forum-selection clause is equivalent to saying that there are matters on which the parties cannot escape domestic law by choosing foreign law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) cmt. g (1988) ("[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power.").

52. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972); *Manrique v. Fabbri*, 493 So. 2d 437, 439 (Fla. 1986).

may not have an exclusive interest in optimizing its own jurisdiction and venue; but the seised court's sovereign has an extraordinarily strong interest in deciding how much it will defer to others as to its jurisdiction and venue. Why should a court let another sovereign manage its docket or dictate access to it? This function is getting close to the heart of any system of justice. What if the other sovereign blindly enforces forum-selection agreements regardless of fairness, or what if the other sovereign is one of those that refuses to enforce any such mandatory or even permissive agreement? The role for the parties in closing or opening the courthouse doors should matter to the seised court.

By interest analysis or the like,⁵³ then, the seised court's sovereign has the predominant interest in being the one to decide where to draw the line between sovereign interest and party autonomy. This meta-interest, not in the content of the rules but in being able to specify that content, indeed appears exclusive. The fact that the parties prefer another law is irrelevant to the meta-interest, as are other sovereigns' interests. Recognizing the meta-interest decidedly swings the conflicts balance. The court therefore should apply its own law on enforceability of forum-selection agreements.⁵⁴

In this light, all of the above bulleted arguments now seem a mere listing of advantages and disadvantages of *lex fori*. The meta-interest argument seems different from them: It directly addresses the conflicts question. It also addresses the subject in a very meaningful way. It not only is a trump card in favor of *lex fori*, but will also imply some extensions

53. See generally WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICTS OF LAWS 175–76, 253–54, 262–65, 267 (4th ed. 2013); Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT'L L.J. 63, 91–96, 110 (2014).

54. Given the notion that the seised court will govern its own jurisdiction and venue, it should not apply any other government's public policy doctrine. See *Martinez v. Bloomberg LP*, 740 F.3d 211, 228 (2d Cir. 2014); BORN & RUTLEDGE, *supra* note 4, at 524–27. That conclusion raises the possibility of the seised court sending a case to the chosen court, which would find the forum-selection clause contrary to its own public policy. But that possibility is not a real problem because a seised court normally will not send a case off to a chosen court that would refuse to entertain the case. That result follows under *lex fori* because, one way or another, the contract law defenses to the clause will defeat it. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. c (1988) (“A court will likewise entertain the action if it finds that for some reason the courts of the chosen state would be closed to the suit or would not handle it effectively or fairly.”); BORN & RUTLEDGE, *supra* note 4, at 501; *cf.* Hague Convention, *supra* note 11, art. 6(d)–(e) (proposing treaty that would establish this rule), *discussed in* BRAND & HERRUP, *supra* note 11, at 94 (describing the Convention's provision against sending a case to a chosen court that would not entertain it as “an analogue to a doctrine of frustration”). Similarly, in the absence of contrary intention, courts normally will not apply the parties' chosen law if it would invalidate the contract. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1988) (“If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake.”); HAY ET AL., *supra* note 11, at 1134–35 (similar); *cf.* *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 722 (2d Cir. 1982) (applying a similar rule to parties' choice of law that would invalidate their forum selection).

and limits, discussed below, as to application of *lex fori* to certain subsidiary issues regarding forum-selection clauses.

Finally, the reader might think that the hypothetical from which I departed was slanted toward a *lex fori* answer. I accordingly need to pose an alternative hypothetical that favors application of the chosen law:

A post-dispute forum-selection clause adding the local corporation's home court as a proper forum is appended to a contract between another state's corporation and a local corporation, but is specifically subjected to the contract's choice-of-law clause. Because the parties knew that the local corporation's home law would hold the forum-selection clause unenforceable on public policy grounds, the local corporation pushed for a choice of the out-of-state corporation's home law, which favors forum-selection clauses. The local corporation brings a contract claim in its home court. The out-of-state defendant moves to dismiss. Which law governs the enforceability of the forum-selection clause, the law of the seised court or the other state's law?

The hypothetical now involves a post-dispute agreement rather than a predispute agreement,⁵⁵ a business-to-business contract rather than a consumer contract,⁵⁶ and a contract claim rather than a tort claim.⁵⁷ These changes increase the chances that any governing law would treat the forum-selection clause as enforceable, but they do not bear on what law should govern.

This hypothetical also involves a prorogation rather than a derogation agreement,⁵⁸ a domestic rather an international contract,⁵⁹ and an explicit rather than implicit subjection of the forum-selection clause to the

55. See *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 888 (Minn. 1982) (referring to "the traditional rule, which a diminishing number of jurisdictions still follow, that forum selection clauses relating to future causes of action will be refused enforcement, while those relating to existing causes of action will be enforced").

56. See BORN & RUTLEDGE, *supra* note 4, at 481–82, 493 (suggesting some wariness in enforcing forum-selection clauses against consumers); Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015); cf. Hague Convention, *supra* note 11, art. 2(1)(a) (proposing treaty that would exclude consumers from coverage).

57. See BORN & RUTLEDGE, *supra* note 4, at 486, 520–21, 546 (suggesting some wariness in interpreting forum-selection clauses to include tort claims).

58. See *id.* at 462–63, 485, 498–502; cf. ROBERT C. CASAD & LAURA J. HINES, *JURISDICTION AND FORUM SELECTION* § 4.19 (2d ed. 1999) (making the same point that derogation clauses are more troublesome to enforce, but misusing the term "prorogation"); Mullenix, *supra* note 3, at 330 (minimizing the difference).

59. See *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 358 n.6 (3d Cir. 1986) ("[T]he greater impact that a less stringent rule would have between parties to a private *international* contract, where the question of forum selection is considerably more important than it would be in a purely domestic contract, where the common law can be presumed to apply. . . . In any event, we believe that this distinction rarely will affect a court's decision to enforce a forum selection clause." (citation omitted)); Yackee, *supra* note 6, at 85–86 (citing cases that arguably showed greater willingness to apply domestic chosen law).

choice-of-law clause.⁶⁰ These changes might bear on what law should govern. Each increases the arguments for applying the chosen law. But it is important that none of the changes addresses the forum's meta-interest in making the decision. It is the seised court that must resolve a true choice-of-law problem: which sovereign's law should draw the line between sovereign interest and party autonomy? The seised court still has the predominant interest in deciding. So, the answer remains the same: *lex fori*, even for a prorogation contract between domestic parties making an explicit choice of law.

C. ENFORCEABILITY VERSUS INTERPRETATION

The third step in the analysis is to decide just how far to go with the application of *lex fori*. A clear view of the actual choice-of-law problem reveals that *lex fori* should not trump the chosen law as to everything. Among other possible limitations,⁶¹ it is conceivable that the law applicable to legal questions of interpretation could differ from the law applicable to enforceability of the forum-selection clause.

The prime example of an interpretation problem would be deciding the scope of the clause. Some federal courts say things like, "Moreover, because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses."⁶² But in fact, there is no logical compulsion to first determine what precisely a forum-selection clause means without looking to the chosen law.⁶³ A court could logically look to the chosen law to see what the forum-selection clause means as to its coverage, and then apply *lex fori* to determine whether the construed clause is enforceable.

So, what law should govern the interpretation of a forum-selection clause? The interests shift as we leave enforceability. On interpretation, the arguments that the seised court should use its own law on jurisdiction and venue lose their determinative force. The seised court can let any

60. See BORN, *supra* note 15, at 138–39 (suggesting that expressly designating the law applicable to the forum-selection clause would help to achieve the application of the chosen law); BORN & RUTLEDGE, *supra* note 4, at 543 (same).

61. One possibility would be distinguishing usual forum-selection clauses from clauses that distinguish among the courts of the chosen forum state. See, e.g., *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151, 153–55 (E.D.N.Y. 2013) (applying federal law to the general enforceability of "You and Google agree to submit to the exclusive jurisdiction of the courts located within the county of Santa Clara, California," but allowing California law to govern the legality of a choosing a particular state court in California). But this is really a different issue, and normally the question of enforceability of the choice among the courts of the destination state would be adjudicated only after suit is brought in that state.

62. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).

63. See *Martinez v. Bloomberg LP*, 740 F.3d 211, 222 (2d Cir. 2014) ("Yet we see nothing to prevent a court from first interpreting the forum selection clause under the law selected by the contracting parties to determine whether it is mandatory and encompasses the claims and parties at issue in the case, before turning to federal law to determine whether the clause should be enforced.").

law determine what the parties agreed, and then apply *lex fori* to decide whether the agreement is enforceable and thus affects its jurisdiction and venue. Meanwhile, the interests behind applying the chosen law persist and even increase. First, there is the background policy of indulging party autonomy unless inappropriate. Second, there are the other usual arguments in favor of giving the parties the power to choose the governing law, such as curbing forum shopping. Third, there is the argument that the forum-selection clause should have the same interpretation everywhere; we do not want the clause to mean one thing here and another thing there. For example, it would be unfortunate to dismiss the pending action here based on one reading of the clause only to send it to another court that reads the clause differently.

I am now in a position to generalize. The law of the chosen court should normally govern interpretation of the forum-selection clause even in the absence of a choice-of-law clause.⁶⁴ One could defend this rule by interpreting the forum-selection clause as an implicit choice-of-law clause for matters relating to the forum-selection clause itself or as the best way to conform to the parties' expectations.⁶⁵ Additionally, one could defend the rule as a way to avoid the conflicts process's difficulty and uncertainty on the preliminary question of the appropriate forum or as the only way to achieve a universal reading of the forum-selection clause.⁶⁶

The pressure for a universal reading implies that "the chosen law" or "the law of the chosen court" should mean its whole law, including its

64. *Lex fori* would govern interpretation if the forum-selection clause is unclear as to which is the chosen court, just as it would if a choice-of-law clause is unclear as to which is the chosen law. See *Proyecfin de Venez., S.A. v. Banco Industrial de Venez., S.A.*, 760 F.2d 390, 395-96 (2d Cir. 1985) (using *lex fori*, in absence of a choice-of-law clause, to interpret which court was chosen by conflicting forum-selection clauses). Similarly, if the forum reads the forum-selection clause as nonexclusive, so that there is no one chosen court's law, the court should apply *lex fori* for interpretation. See *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union 348 v. Koski Constr. Co.*, 474 F. Supp. 370, 372 (W.D. Pa. 1979) (using *lex fori*, in absence of a choice-of-law clause, to interpret forum-selection clause as nonexclusive); GARNETT, *supra* note 41, at 105 (getting to the same result by saying that there "are two distinct aspects to the issue of interpretation: the first is whether the clause is 'exclusive' or 'non-exclusive' and the second is whether the clause, as a matter of scope, applies to the claims"). It is conceivable that the forum would read the clause as exclusive, and so the forum would apply the chosen court's law, which happens to read the clause as nonexclusive; the nonexclusive reading would then prevail. The generalizing idea is that *lex fori* governs forum-selection agreements, unless the parties make an explicit or implicit choice of another law for interpretation.

65. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. a (1988) ("But even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied."); cf. Yackee, *supra* note 6, at 90-94 (noting also that courts and arbiters treat choice of place of arbitration as an implicit choice of law).

66. A logical problem might seem to appear in looking to the chosen court's law for interpretation before determining the forum-selection clause's enforceability. However, if one looks to the chosen court's law for interpretation and then decides the clause is enforceable, one has looked to the right law for interpretation. If one instead decides nonenforceability, one need not further pursue interpretation.

conflicts rules.⁶⁷ Whenever one looks to foreign law on interpreting a forum-selection clause, one is looking for how the foreign court would read it. One must unearth which law the foreign court would actually apply to the forum-selection clause. Then all courts can reach the same result. Of course, the foreign court will normally apply its own law, so observing this nicety of applying its whole law is of mainly theoretical significance.⁶⁸

In conclusion, the entire rule would be to *apply the whole lex fori on enforceability while applying the whole chosen law or chosen court's law on interpretation of the forum-selection agreement*, regardless of whether there is a choice-of-law clause.⁶⁹ In fact, viewing the problem in its entirety augments clarity. Rather than just addressing the problem at hand, the Second Circuit has begun more broadly stating its entire rule as a premise. In *Martinez v. Bloomberg LP*,⁷⁰ which is likely to become the leading case, the Second Circuit laid out its reasoning at length:

67. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2) cmt. h (1988); RICHMAN ET AL., *supra* note 53, at 183–85; cf. Hague Convention, *supra* note 11, art. 6(a) (proposing treaty that would look at law of the chosen court for some aspects of contractual validity, namely, whether “the agreement is null and void under the law of the State of the chosen court”); *id.* art. 9(a) (doing the same in the situation of recognition and enforcement). The Convention would give the existence of effective agreement to *lex fori*, as well as the clause’s interpretation, but the chosen court’s law would determine what law governs defenses to its enforcement. See BRAND & HERRUP, *supra* note 11, at 20, 79–82, 87–90 (saying that the reference to the chosen court’s law is a reference to its whole law, including its conflicts rules); TREVOR HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT ON THE 2005 HAGUE CHOICE OF COURT AGREEMENTS CONVENTION ¶ 149 (2013) (explaining that the Hague Convention’s looking at the chosen court’s law “helps to ensure that the court seised and the chosen court give consistent judgments on the validity of the choice of court agreement”). By contrast, courts in most other situations look only to the local (or internal) law of the foreign system, not the foreign conflicts rules, to avoid renvoi. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1988) (“In the absence of a contrary indication of intention, the reference [in a choice-of-law clause] is to the local law of the state of the chosen law.”); HAY ET AL., *supra* note 11, at 1137.

68. Likewise, reference to “*lex fori*” means the forum’s whole law, including its conflict rules. So, the seised court conceivably could formulate an explicit choice of other law to govern particular issues. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 198 (1988) (choosing generally the law governing a contract to govern the capacity of the parties to the contract), with Hague Convention, *supra* note 11, art. 6(b) (proposing treaty that would look to “the law of the State of the court seised” for determining the capacity of the parties to a forum-selection agreement).

69. See Phillips v. Audio Active Ltd., 494 F.3d 378, 385–86 (2d Cir. 2007) (dictum) (“We find less to recommend the invocation of federal common law to interpret the meaning and scope of a forum clause Little discussion of the issue can be found in federal court decisions. . . . [W]e cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.” (citations omitted)); AVC Nederland B.V. v. Atrium Inv. P’ship, 740 F.2d 148, 155–56 (2d Cir. 1984) (applying chosen Dutch law to interpret mandatory nature of clause, but federal law for its enforceability); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 321 (1990) (stressing the need for rules).

70. 740 F.3d 211, 214 (2d Cir. 2014) (holding that “where a contract contains both a valid choice-of-law clause and a forum selection clause, the substantive law identified in the choice-of-law clause governs the interpretation of the forum selection clause, while federal law governs the enforceability of the forum selection clause”).

Where a contract contains both a choice-of-law and a choice-of-forum clause, does federal law or the body of law specified in the choice-of-law clause govern the effect of the choice-of-forum clause in an action brought in a federal district court?

In answering this question, we distinguish between the *interpretation* of a forum selection clause and the *enforceability* of the clause. . . .

. . . Furthermore, “federal law should be used to determine whether an otherwise mandatory and applicable forum clause is *enforceable* under *Bremen*” In answering the *interpretive* questions posed . . . , however, we normally apply the body of law selected in an otherwise valid choice-of-law clause. Hence, if we are called upon to determine whether a particular forum selection clause is mandatory or permissive, or whether its scope encompasses the claims or parties involved in a certain suit, we apply the law contractually selected by the parties.

This approach reconciles respect for contracting parties’ legitimate expectations with other important federal policies. If the enforceability of a forum selection clause were governed by the law specified in the choice-of-law clause, then contracting parties would have an absolute right to “oust the jurisdiction” of the federal courts. . . .

The presumptive enforceability of forum selection clauses reflects a strong federal public policy of its own, which would likewise be undermined if another body of law were allowed to govern the enforceability of a forum selection clause. . . .

. . . .

It would undermine the predictability fostered by forum selection clauses, however, if federal law—rather than the law specified in a choice-of-law clause—were to govern the *interpretation* as well as the enforceability of a forum selection clause. . . . To ensure that the meaning given to a forum selection clause corresponds with the parties’ legitimate expectations, courts must apply the law contractually chosen by the parties to interpret the clause.

Distinguishing between the enforceability and the interpretation of forum selection clauses, moreover, accords with the traditional divide between procedural and substantive rules

. . . The demand for a uniform federal standard governing the enforceability of a forum selection clause is especially strong in an international context, as here. . . .

There is no similar federal interest, however, in overriding parties’ contractually chosen body of law in favor of uniform federal rules governing the interpretation of forum selection clauses. . . . Contract law—including the rules governing contract interpretation—is quintessentially substantive⁷¹

71. *Id.* at 217–21 (citations omitted) (quoting *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007)).

This case's clarity generates hope that other courts will henceforth see the problem in its fullness, and the case law will thereby fall more evidently into ever increasing uniformity.⁷²

III. FIT WITH OTHER DOCTRINES

Both the case law and the conflicts policies tip toward applying *lex fori* for enforceability while applying the explicitly or implicitly chosen law for interpretation. This Part demonstrates that this approach to forum-selection clauses conforms with related areas in the law, selecting three areas that are so closely related as to be overlapping.

A. *ERIE*

The first related problem is whether state or federal law governs forum-selection clauses in a diversity case, or in any other federal case that might involve state law. Although the two settings are very similar, this *Erie* setting of vertical choice of law differs from the horizontal setting discussed in Parts I and II because *Erie* poses preliminary and final questions: First, does federal or state law get to decide whether it is a local law or the chosen law that governs enforceability or interpretation? Second, there is the usual horizontal question of what the federal or state law says about the conflicts choice between local and chosen law. Third, where *lex fori* applies, to what extent does state substantive law infiltrate the forum-selection law of the federal forum?

State law could conceivably play a big role in regard to the vertical questions.⁷³ In related contexts, state law does get a vertical role:⁷⁴ under *Erie*, state law plays a role in federal court on the enforceability of arbitration clauses⁷⁵ and a bigger role on the enforceability of choice-of-

72. See, e.g., *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 648–51 (4th Cir. 2010) (applying chosen English law to interpret mandatoriness of clause, but federal law for its enforceability); *Brenner v. Nat'l Outdoor Leadership Sch.*, No. 13-02908, 2014 WL 2069364, at *5 (D. Minn. 2014) (“Although *enforceability* of a forum selection clause is analyzed under federal law, where there exist both valid forum selection and choice-of-law clauses, the substantive law identified in the choice-of-law clause governs *interpretation* of the forum selection clause.”).

73. See, e.g., Kelly Amanda Blair, Note, *A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie a Second Chance*, 46 GA. L. REV. 799, 817 (2012) (“Under *Byrd* [*v. Blue Ridge Rural Electric Cooperative, Inc.*, 365 U.S. 525 (1958)], the outcome-determinative nature of the conflict between federal versus state law and the absence of any overwhelming federal policies on point dictate that, in line with the goals of *Erie*, state law controls the enforcement of forum-selection clauses.”); Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068, 1084 (1989) (arguing for state law, while admitting the majority of federal cases go for federal law).

74. See *supra* notes 46–47 (describing the horizontal question in the contexts of arbitration and choice-of-law clauses).

75. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (holding that state law governs enforceability of an arbitration clause in an intrastate contract); BORN & RUTLEDGE, *supra* note 4, at 1166 (discussing applicable state law on contract defenses).

law clauses.⁷⁶ However, the policy arguments as to forum-selection clauses stay pretty much the same as we shift from the horizontal question to the vertical questions. The forum maintains strong interests in controlling its own jurisdiction, venue, and procedure through its conflicts and enforceability doctrines. Still, the state's substantive interests for and against party autonomy will have some claim to applicability under *Erie*, especially as to interpretation.

What do the cases say? The case law looks far from settled, if the cases are viewed as an undifferentiated mass.⁷⁷ But drawing some basic distinctions again makes sense of the cases.

As to enforceability, most diversity cases look to federal law.⁷⁸ That is, the federal court uses federal law to decide which law governs enforceability, federal law chooses *lex fori*, and *lex fori* is mainly the federal law of enforceability. The cases do not stop with the simplistic thought that state law governs *contracts*. They realize that these are special contracts on *forum allocation*. The federal forum has strong interests in discretionarily controlling its own jurisdiction, venue, and procedure,

76. See BORN & RUTLEDGE, *supra* note 4, at 772.

77. See Kendra Johnson Panek, *Forum Selection Clauses in Diversity Actions*, 36 J. MARSHALL L. REV. 941, 944 (2003); Yackee, *supra* note 6, at 65–67.

78. See, e.g., *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 826–28 (6th Cir. 2009) (deciding in favor of federal law, but noting that a few circuits favor state law); *Haynsworth v. Corp.*, 121 F.3d 956, 962 (5th Cir. 1997) (“Federal law applies to the [forum-selection or choice-of-law] clause enforceability determination.”); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 50 (1st Cir. 1990) (applying federal law to determine whether the forum-selection clause was enforceable); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (“Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature.”); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512–13 (9th Cir. 1988) (concluding “federal law applies in our analysis of the effect and scope of the forum selection clause”); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986) (holding alternatively “that the enforceability of a forum clause (venue limitation) is clearly a federal procedural issue and that federal law controls”); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985) (“While *The Bremen* is an admiralty case involving an international contract, this Court has applied its reasoning in diversity cases not involving international contracts.”); *Strategic Mktg. & Commc’ns, Inc. v. Kmart Corp.*, 41 F. Supp. 2d 268, 271 (S.D.N.Y. 1998) (“Precedent is clear, however, that in diversity cases such as this one, federal common law governs the enforcement of forum selection clauses.”); *Moretti & Perlow Law Offices v. Aleet Assocs.*, 668 F. Supp. 103, 105–06 (D.R.I. 1987) (holding that federal—rather than state—law must govern venue selection); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147 (N.D. Tex. 1979) (applying federal law to enforceability and interpretation because “[w]here suit will lie in the federal system is peculiarly the concern of the federal courts”); BORN & RUTLEDGE, *supra* note 4, at 532 n.176, 539–43 (saying that most federal cases apply federal law, often without discussion); CASAD & HINES, *supra* note 58, § 4.19 (saying broadly that federal law controls); 14D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3803.1 (4th ed. 2013) (collecting cases); Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 37 COLUM. J. TRANSNAT’L L. 663, 676 (1997) (“[A] majority of the federal courts have applied federal law where state law should have applied.”). But see *Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912, 916–19 (11th Cir. 1989) (viewing the clause in terms of personal jurisdiction and applying state law); *Rindal v. Seckler Co.*, 786 F. Supp. 890, 893–94 (D. Mont. 1992) (viewing Montana’s prohibition of forum-selection clauses as a public policy).

which should prevail over comparable state interests on such matters.⁷⁹ A powerful additional argument for federal law's major role in federal court is that the Supreme Court has indicated that the federal statutes on transfer of venue⁸⁰ or the federal doctrine of *forum non conveniens*⁸¹ can override the forum-selection clause, even in a diversity case.⁸²

In a more detailed answer to the third question above, federal law controls both enforceability in principle and contractual validity of the separable forum-selection agreement. Recall that validity includes issues like lack of assent and unconscionability, which really involve the circumstances where the forum will let the parties override its jurisdiction, venue, or procedure.⁸³ However, any state law of specifically substantive public policy, such as that embodied in a state statute protecting franchisees from having to litigate claims in an out-of-state court, will supplement that federal law in federal court.⁸⁴ Although the federal forum has strong

79. See Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1111–12 (1988) (arguing that federal law “would promote uniformity to enhance contract predictability and would facilitate the fairness and federalism concerns that underlie the *Erie* doctrine” while “a state court’s parochial interest in preventing jurisdiction ousting is not the type of substantive right that *Erie* sought to protect”). The contrary arguments in favor of state law stress that state law usually governs contracts and that application of federal law would have outcome-determinative effects. See BORN & RUTLEDGE, *supra* note 4, at 538–39; Sorensen, *supra* note 6, at 2546–49, 2553–56 (arguing for applying state law on validity). I am not saying that the *Erie* analysis is an easy one in theory. See Stephen E. Sachs, *Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761, 765–68 (2015). Indeed, academics with their own *Erie* theory tend to favor state law. See, e.g., Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795 (2015); Symposium, *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517 (1995) (revealing split, while most of the participants favored state law). But the academics manage to do so by disregarding the case law, which resolves the *Erie* question in favor of federal law on the view that the outcome-determinative effect and the nonspecific state interests regarding agreement on state forum do not overcome the federal interests in controlling federal jurisdiction, venue, and procedure.

80. In the view of some, the recent § 1404 cases settle much of the *Erie* debate. E.g., Mullenix, *supra* note 3, at 333 (saying that *Ricoh* “definitively answered the *Erie* question” in favor of federal law).

81. *Forum non conveniens* poses a very similar *Erie* problem. For the proposition that federal law controls *forum non conveniens* in federal court even in diversity cases, see Kevin M. Clermont, *The Story of Piper: Forum Matters*, in CIVIL PROCEDURE STORIES 199, 221 (Kevin M. Clermont ed., 2d ed. 2008).

82. See *supra* notes 23–26 and accompanying text. Moreover, if the United States were to sign, ratify, and implement a treaty on forum-selection clauses that then came into force, the result would be to legislate the application of federal law and thus to moot the *Erie* debate. See *supra* note 11.

83. See *Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990) (holding that federal law governs whether “the clause was obtained through fraud or overreaching”).

84. See *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 495, 497 (9th Cir. 2000) (declining to enforce forum-selection clause because “it contravened California’s strong public policy against enforcing such clauses in franchise agreements,” after first saying, “[i]n diversity cases, federal law governs the analysis of . . . forum selection clauses”); *Tri-State Found. Repair & Waterproofing, Inc. v. Permacrete Sys., Ltd.*, No. 99-1132-CV-W-6, 2000 WL 245824 (W.D. Mo. Mar. 1, 2000) (similar); Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court’s Pending Review of Atlantic Marine*, CONSTRUCTION LAW., Summer 2013, at 27, 30 (many states prohibit forum-selection clauses in certain industries, like construction); cf. *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007) (applying unspecified

interests in controlling its own jurisdiction, venue, and procedure, specifically substantive state interests can occasionally be strong enough to shift the balance and so call for state law to apply under *Erie*.

As to legal questions on interpretation of the clause, state law tends to apply in diversity cases.⁸⁵ That is, the federal court uses the law of the forum state to decide which law governs interpretation, the forum state would select a law of interpretation under its rules for choice of law, and the selected law applies in federal court.⁸⁶ The federal court has no great interest in controlling interpretation, and in the *Erie* setting, the federal court should defer in favor of state law rather than formulate the optimal choice-of-law or interpretation rule itself. Uniformity of outcome between federal and state court thus results.

Ohio public policy); *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (applying unspecified Missouri public policy); Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. Rev. 422, 449–50 (1991) (“Some states view forum-selection clauses as contrary to public policy, thus raising a conflict between state and federal law in diversity cases.”). In the horizontal setting, the seised court does not look to the chosen court’s public policy. See *supra* note 54. This results from the fact that the chosen court’s public policy has no bearing on the seised court’s decision regarding its own jurisdiction or venue. But in the *Erie* setting, the state’s substantive policies have a call on the federal court’s law, provided that they are specifically substantive rather than some general policy against forum-selection agreements. One might call such provisions “super-mandatory” rules. See O’HARA & RIBSTEIN, *supra* note 29, at 62–64, 219–22 (describing provisions that trump any specific attempts to escape local law).

85. See *Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003) (applying state law to construe clause as nonexclusive). Some cases do apply federal law to interpretation. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512–13 (9th Cir. 1988) (“[F]ederal law applies in our analysis of the effect and scope of the forum selection clause.”). But often these cases turn on uncovering intent, diving into which the courts feel comfortable without much of a choice-of-law process. See, e.g., *Wells Fargo Century, Inc. v. Brown*, 475 F. Supp. 2d 368, 371 (S.D.N.Y. 2007) (“In general, a clause is mandatory if its language indicates the parties’ intent that only one forum could decide their disputes.”); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148 (N.D. Tex. 1979) (saying, as to mandatoriness, that “the language reveals an intention to designate that county as the only place where suits on the contracts may be brought”); cf. *supra* note 39 (making similar point in the non-*Erie* setting).

86. See *TH Agric. & Nutrition, L.L.C. v. Ace European Grp. Ltd.*, 416 F. Supp. 2d 1054, 1075 (D. Kan. 2006) (“Thus, under Kansas law, the parties’ contractually chosen law, which is the law of The Netherlands, governs interpretation of the forum selection clause.”), *aff’d on other grounds*, 488 F.3d 1282 (10th Cir. 2007); *Global Link, LLC v. Karamtech Co.*, No. 06-CV-14938, 2007 WL 1976147, at *1 (E.D. Mich. July 3, 2007) (looking to state law that would apply chosen Korean law for interpretation of mandatoriness of clause); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F. Supp. 1140, 1143–44 (W.D. Va. 1979) (holding that Virginia law would require chosen Arizona law to apply to forum-selection clause); *Taylor*, 474 F. Supp. at 147 n.2 (dictum) (“This court would have to determine whether under Texas conflicts law, this dispute is a matter of venue or a matter of contract law. If the former, Texas choice-of-law rules would dictate application of the law of the forum state, i.e., Texas. If under Texas conflicts law this were viewed as primarily a question of contract law, then arguably a Texas court would apply Missouri law to its resolution, in view of the contractual choice-of-law provision.”); Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 155–56 (“The answer to this question must be found in the conflict-of-laws rules of the forum state and depends on the characterization of the question of enforceability of forum-selection clauses, this time by the forum state in which the federal court sits.” (citation omitted)).

There is, of course, an analogous reverse-*Erie* question as to the role of federal law in state court. So, switch from federal court to a forum-selection clause question arising in state court. First, in state law cases in state court, enforceability works out the normal way, in favor of *lex fori*; thus, in state court, the governing law is usually the state's law.⁸⁷ The same is true even in international or admiralty cases,⁸⁸ despite the tenable reverse-*Erie* argument that federal interests call for the application of federal law in these state cases.⁸⁹ The reason is that any interests in foreign relations, international commerce, or substantive law appear weaker upon closer inspection, as forum-selection clauses really present a jurisdiction, venue, or procedure issue. Second, interpretation should follow state choice of law, which often leads to the law of the parties' choosing.⁹⁰

Both federal and state courts, then, mainly apply *lex fori* for enforceability while applying the chosen law for interpretation of forum-selection agreements. In sum, a strong argument in support of this Article's solution is that largely the same approach applies in the *Erie* and reverse-*Erie* settings.

B. SUBJECT MATTER JURISDICTION CLAUSES

Given that the governing law on forum-selection agreements depends on whether the parties are in federal or state court, the incentive exists for them to maneuver on the federal/state axis to get into the more favorable forum. I therefore need to switch from forum selection in terms of territorial adjudicatory authority to forum selection in terms of subject matter jurisdiction. This latter is a different problem from those addressed in Parts I and II, because concerns of federalism inject themselves here. Nevertheless, the same insight (the decision in question here is which sovereign should get to draw the line on forum selection) reveals how this Article's solution (applying *lex fori* for enforceability while applying the chosen law for interpretation of the forum-selection agreement) fits

87. See *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554, 556 (Ala. 1980) (rejecting under Alabama law the choice of a Florida forum and saying, "[p]arties may not confer jurisdiction by consent, nor may they limit the jurisdiction of a court by consent"), *overruled by* *Prof'l Ins. Corp. v. Sutherland*, 700 So. 2d 347, 352 (Ala. 1997) (accepting forum-selection agreements as a matter of state law); *Cartridge Rental Network v. Video Entm't Inc.*, 209 S.E.2d 132, 133 (Ga. Ct. App. 1974) ("Under [Georgia law], a provision of a contract fixing the venue of an action on the contract as to future litigation is void as contrary to public policy."), *disapproved in* *Harry S. Peterson Co. v. Nat'l Union Fire Ins. Co.*, 434 S.E.2d 778, 782-83 (Ga. Ct. App. 1993) (accepting forum-selection agreements as a matter of state law); Lee, *supra* note 78, at 681.

88. See, e.g., *Zurich Ins. Co. v. Allen*, 436 So. 2d 1094, 1095 (Fla. Dist. Ct. App. 1983) (applying state law in international case to ignore forum-selection clause), *overruled by* *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986) (accepting forum-selection agreements, apparently as a matter of state law).

89. See *Prado v. Sloman Neptun Schiffahrts, A.G.*, 611 So. 2d 691, 693-94 (La. Ct. App. 1992) (applying federal law to uphold choice of Philippines forum in maritime case); Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

90. See *supra* note 86.

comfortably not only with *Erie*, but also with the law on subject matter jurisdiction agreements—both employ a conflicts solution like this Article's, except for particularized federalist overrides.

Parties agreeing to a federal forum seem to present no special problem, as long as the federal court otherwise has subject matter jurisdiction.⁹¹ That is, the parties may *renounce* the subject matter jurisdiction of state court, but they may not by agreement *bestow* federal subject matter jurisdiction. Courts have come to view a clause choosing a federal court with subject matter jurisdiction as an ordinary forum-selection agreement, blessed by the tolerance of modern law for such agreements. The clause should be subject to the usual choice-of-law rules for forum-selection agreements, including *lex fori* on enforceability.

Parties agreeing to a state forum, however, do make courts more nervous. Still, the law has evolved. Parties today may agree that an action, which is not within exclusive federal jurisdiction, will proceed in state court but not in federal court.⁹² That is, the parties may renounce federal subject matter jurisdiction. Bringing suit in state court pursuant to the agreement will not present an issue. However, the enforceability of such an agreement could arise in federal court either after removal by the defendant⁹³ or after original suit by the plaintiff,⁹⁴ if done in violation of the agreement. The federal court will then apply federal law on the enforceability issue. Although federal courts arguably should apply state law on interpretation of the agreement, they typically construe the clause without pausing on choice of law.⁹⁵

Neither a state nor a federal court will enforce an agreement selecting a state court for claims existing exclusively within federal

91. See *Schlessinger v. Holland Am., N.V.*, 16 Cal. Rptr. 3d 5, 7 (Ct. App. 2004). In *Schlessinger*, the California Court of Appeal dismissed the state action pursuant to the following contractual provision:

All disputes and matters whatsoever arising under, in connection with or incident to this contract . . . shall be litigated, if at all, in and before the United States District Court for the Western District of Washington at Seattle, or, as to those lawsuits as to which the federal courts of the United States lack subject matter jurisdiction, in the courts of King County, State of Washington, U.S.A., to the exclusion of all other courts.

Id.

92. See 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721 (4th ed. 2009); Michael D. Moberly, *Judicial Protection of Forum Selection: Enforcing Private Agreements to Litigate in State Court*, 1 PHOENIX L. REV. 1, 18–21 (2008).

93. See *Karl Koch Erecting Co. v. N.Y. Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659–60 (2d Cir. 1988) (ordering remand).

94. See *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (ordering dismissal).

95. E.g., *Karl Koch Erecting Co.*, 838 F.2d at 659; *O & G Carriers, Inc. v. Rosenthal & Co.*, 685 F. Supp. 66, 67 (S.D.N.Y. 1988); David S. Coale et al., *Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation*, 29 REV. LITIG. 327, 328–29 (2010) (saying that the circuits are split between applying ordinary interpretation rules and requiring clear language of waiver of removal).

jurisdiction.⁹⁶ There is, however, nothing preordained about this position. After all, when a U.S. court upholds the selection of a foreign forum, it is allowing the parties to waive even exclusive federal jurisdiction.⁹⁷ So, federal law could decide to enforce a state-court choice even as to exclusive jurisdiction,⁹⁸ but federal law has decided not to. Freedom of contract is not to run wild. Just as for territorial jurisdiction and venue agreements, *lex fori* puts limits on when the parties can agree to derogation of subject matter jurisdiction. Courts read the congressional command of exclusive federal jurisdiction as an implicit prohibition of any contrary party agreement, as well as an implicit prohibition of any contrary state law.

C. CUSTOMIZED LITIGATION

As it became more accepted in the 1960s that holders could waive civil procedural rights,⁹⁹ parties slowly started agreeing to create a somewhat customized procedural system for their litigation.¹⁰⁰ That is, if the parties could waive important procedural protections by consent, then they could likewise choose predispute¹⁰¹ or post-dispute¹⁰² to customize their litigation, subject to the restraints of contract law and only up to some vaguely defined limits centered on the idea that parties can sign away their own rights but cannot intrude on third parties or on sovereign interests.¹⁰³ Of late, customization seems to have become a boom industry.¹⁰⁴

96. See *O & G Carriers*, 685 F. Supp. at 67 ("Since, as noted, the Commodities Exchange Act dictates that federal district courts have *exclusive* jurisdiction in private actions for damages under the Act, a state forum is necessarily precluded." (internal citation omitted)). Nor does federal law allow a state court to accept jurisdiction on the basis of such an agreement. See *Am. Ins. Co. v. Kinder*, 640 S.W.2d 537, 540 (Mo. Ct. App. 1982) (disallowing the parties to agree to jurisdiction in a state court over a claim within exclusive federal jurisdiction).

97. See *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (upholding English forum for claims asserted under federal securities law).

98. See *Moberly*, *supra* note 92, at 39–55 (arguing that the federal court could stay its action until the parties pursued any related concurrent jurisdiction claims in the selected state court).

99. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (approving cognovit note); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (approving the defendant's waiver in advance of objections to territorial jurisdiction); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 734–38 (2011).

100. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 857 (2006) (describing customization of procedure as hitherto unexplored).

101. See Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579 (2007); cf. Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475 (2013) (warning about maintaining a proper time perspective when weighing costs and benefits).

102. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 495–501 (2007).

103. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1397–98 (2012) (recognizing limits "when parties expressly agree to exclude a third party with legal rights that might be seriously affected, when the agreement is sharply one-sided and the

At the least, the literature on the subject has mushroomed, whether championing the new freedom¹⁰⁵ or stressing that limits exist to cabin that freedom.¹⁰⁶ “Proponents of a broad scope for party rulemaking argue that the efficiency and autonomy benefits outweigh the costs. Those who advocate strict limits place greater weight on the potential unfairness to

market has little competition, and when the agreement adopts procedures that seriously disable private enforcement of the substantive law or impair the proper consideration of civil rights claims,” as well as expressing concern for “party rulemaking that tinkers with procedures and rules closely tied to the judge’s or the jury’s reasoning process”); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 513–15 (2011) (saying that “private transactions presumptively are efficient only if there are no negative externalities, that is to say, no adverse effects on third parties,” including lesser “production of public goods that play a critical role in shaping public policy, encouraging social trust, and supporting democratic values,” but also recognizing that “agreements are not always mutually beneficial to the parties and in some cases inappropriately extinguish constitutional and statutory rights”); Moffitt, *supra* note 102, at 521 (“[T]he customized rule should govern the litigation, provided the adaptation does not run afoul of the constitutional or statutory provisions empowering the court, does not hurt the public’s legitimate interest in the litigation process, and does not prejudice nonlitigants.”); Noyes, *supra* note 101, at 583 (recognizing limits “where Congress has acted to affirmatively prohibit modification of a specific litigation rule”; “where the agreement seeks to waive litigation rights of a person who is not a party to the contract, including the public’s litigation rights”; and “where there is an overriding procedural consideration that prevents enforcement of the contract because it would irreparably discredit the courts”); S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027 (2014) (finding limits on procedural choice both in structural concerns involving questions of institutional design and the old understanding of sovereign prerogative over judicial affairs and also in substantive concerns focusing on individual liberty and fundamental due process rights). Additionally, waiver of some constitutional rights is likely subject to closer scrutiny. See Noyes, *supra* note 101, at 583, 635–36 (“[W]here the contract waives certain constitutional rights, it may be unenforceable if it was not made knowingly, voluntarily, and intelligently.”).

104. See, e.g., TRIAL BY AGREEMENT: AGREEMENTS FOR OPPOSING COUNSEL, <http://trialbyagreement.com> (last visited Apr. 4, 2015). But see David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389 (showing that customization of procedure is not yet common in practice).

105. See, e.g., Moffitt, *supra* note 102, at 465 (arguing “for a radical expansion of litigants’ customization options”); Noyes, *supra* note 101, at 647 (“[T]his freedom of contract adds value to the litigation rights.”); Scott & Triantis, *supra* note 100, at 856–60 (using economic analysis).

106. See, e.g., Davis & Hershkoff, *supra* note 103, at 507 (arguing that “contract procedure operates as a form of privatization that effectively outsources government functions to private contracting parties”); Dodge, *supra* note 99, at 729 (“The end of civil procedure as a mandatory guarantor of procedural justice and its replacement by market forces has the capacity to reshape not only the role of the private right of action between contracting parties but also the broad swath of statutory, constitutional, and common law obligations that rely upon it as a primary mechanism of enforcement.”); Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014) (arguing generally against party control); Mullenix, *supra* note 3, at 372 (“recognizing that the supremacy of contract principles in civil law waiver has sacrificed fundamental litigation rights”); Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 527–30 (2013) (arguing for a shift from contract norms to procedural norms); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1088 (2002) (arguing that courts “have overlooked, if not forsaken, an underlying concern for fundamental fairness in favor of preservation of contractual autonomy”); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 211 (“Decisions about procedure should not, however, be made irrevocably based on pre-dispute bargaining power, behind a veil of ignorance, by parties considering only themselves.”).

weaker parties and focus more strongly on risks to adjudicative legitimacy and on other institutional costs."¹⁰⁷

Today, the parties might attempt to alter pleading rules,¹⁰⁸ restrict joinder or discovery, change the rules of evidence,¹⁰⁹ waive jury trial,¹¹⁰ or limit or prohibit appeal. In fact, they could try to make litigation look a lot like a peculiarly effective brand of arbitration,¹¹¹ or they might agree to abide in our courts by some set of transnationally "neutral" rules of procedure.¹¹² Many of the normal rules of procedure thus become no more than default contractual rules, which the parties can extensively modify through negotiation.¹¹³ In sum, the modern judicial trend is to elevate freedom of contract to the full extent of parties' waiving their own rights, thereby discounting the old view that sovereign interests resided in those rights.

Comprehension of the law on forum-selection agreements benefits further from comparison to the law on customized litigation. The two stories are different, as the former has much longer and distinctive historical roots.¹¹⁴ But they share evolutionary pressures, as well as the tension between sovereign interests and party autonomy.

The various legal systems' growing acceptance of forum-selection agreements, subject to certain limits, fits comfortably with the embrace of freedom of contract in customized litigation. Likewise, applying the chosen law to interpretation of the agreement conforms to modern trends of empowering party customization. But this Article's suggestion to apply *lex fori* on enforceability of the forum-selection agreement seems less consistent—especially when *lex fori* applies despite the parties' evident intent to choose another law to govern enforceability.

To reconcile this application of *lex fori*, one needs to recall the limits of the modern movement toward customized litigation. The law still provides that the parties cannot customize certain matters. Quite simply, forum selection is one such matter. The decision about how far to go in accepting forum-selection agreements remains one for the sovereign, and

107. Bone, *supra* note 103, at 1334 (finding these arguments "insufficiently theorized").

108. See Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1, 1–2 (2010) (favoring such contracts).

109. See John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159 (2001) (taking first steps in analyzing this unexplored area).

110. See Amanda R. Szuch, Comment, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435 (2010) (discussing *Erie* implications).

111. See Noyes, *supra* note 101, at 583–84; Charles W. Tyler, Note, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1593 (2013).

112. See ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006).

113. See Moffitt, *supra* note 102, at 462 ("[T]he current set of procedural rules should be treated as default rules, rather than as nonnegotiable parameters.").

114. See Marcus, *supra* note 8, at 1042–48; *supra* Part I.B.

a difficult one. Recall further that the decision in question here is which sovereign should get to draw the line on forum selection. This decision is much more squarely of sovereign interest, so the choice of law remains within the forum's control, despite any attempt by the parties to contract around it.

Thus, the same idea of expansion of party autonomy, up to certain limits that respect sovereign interest, explains both the general development of customized litigation and the specific resolution of the governing law for forum-selection agreements. In each story the need to accommodate tension results in drawing a line. Certain matters still remain beyond the control of the parties.

CONCLUSION

Finally resolving this problem of governing law is important both because big differences remain among legal systems' law on forum-selection agreements and because the parties' pursuit of certainty through agreement depends on having a clear conflicts backdrop upon which to act. Courts and commentators that have confronted the problem show far more confusion than is optimal or justifiable.

Years of judicial and academic contortions have hidden a simple solution to the problem of governing law on forum-selection agreements. Case law, policy arguments, and doctrinal consistency all support applying *lex fori* on enforceability of the forum-selection agreement. Contrariwise, the chosen law, if there is a choice-of-law clause, or the law of the chosen court, if there is no choice-of-law clause, should apply to interpretation of the forum-selection agreement.